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MYGLAM SDN BHD v. MALAYSIAN TIMBER COUNCIL

HIGH COURT MALAYA, KUALA LUMPUR
NADZARIN WOK NORDIN J
[CIVIL APPEAL NO: WA-12BC-2-03-2022]
13 FEBRUARY 2023

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Abstract – *Where there are acts of prevention which prevent a contract from being performed, the original completion date is cancelled or suspended and time will be set at large. Following this, the employer should not be entitled to claim for liquidated damages under the contract because, by its acts, there is no date from which the damages could be assessed.*

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CONTRACT: *Agreement – Breach – Parties entered into contract to manufacture, design, build, install, complete and deliver glue laminated timber pedestrian bridge – Delays causing project to not be completed by agreed completion date – Contract terminated – Allegations of acts of prevention preventing contract from being performed and deviations from terms agreed – Whether contract rightly terminated – Whether there was breach of agreement – Whether original completion time cancelled/suspended – Whether time set at large – Whether claimant entitled to damages*

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By way of an agreement, the respondent had formally appointed and engaged the services of the appellant to manufacture, design, build, install, complete and deliver glue laminated timber pedestrian bridge at Precinct 16, Putrajaya to the respondent for the contract price of RM1,789,000 on or before 23 August 2016 ('first completion date'). Due to the constraints of the time frame to complete the work and the allegedly slow-moving, sluggish performance of the appellant, the respondent engaged a consultant to assist and facilitate the works, by supervising the appellant in the production and testing of the beams for the project. A second completion date was set *ie,* 17 July 2017. However, according to the consultant, the appellant failed, refused and/or neglected to comply with the procedures and instructions set by him. The respondent was of the view that the appellant failed to fulfil its contractual obligations as per the agreement. The respondent then terminated the agreement and commenced a claim at the Sessions Court against the appellant, seeking, *inter alia*, a sum of RM729,953.96. The appellant counterclaimed and submitted that, *inter alia*, the delay in the completion of the project was due to the frequent number of changes to the design which involved an increase in costs. In allowing the respondent's claim and dismissing the appellant's counterclaim, the Sessions Court held that the respondent had rightly terminated the contract as the appellant had delayed and did not complete the project by the second completion date and thus, was in breach of the contract. Hence, the present appeal.

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Held (allowing appeal):

(1) For the contract to be terminated, cl. 6.1.2 of the contract provided that a default notice was required to be issued beforehand by the contract administrator to rectify the default within a specific period or, if no period is mentioned therein, within 14 days from the date the appellant receives the said notice with the right to the respondent to terminate the contract due to the failure to rectify the same. As the respondent insisted on relying on the first completion date as per the contract, it would then be incumbent upon the respondent to comply with cl. 6.1.2 of the contract and comply with cl. 1.5, with regards any variation to the works under the contract, of which the respondent failed to do. The respondent's acts disentitled it from relying on the first completion date. The termination was not in accordance with the contract. As such, the termination was wrongful due to the failure of the respondent to strictly comply with cl. 6 of the contract. (paras 24, 25 & 28)

(2) The court could not agree with the SCJ's findings that the appellant had breached the contract and did not complete the project by the second completion date. The SCJ further failed to appreciate or consider the location and change of specifications and that the appellant was told to cease fabrication works on 24 January 2017. (para 26)

(3) Although the consultant's appointment and proposal with regards the project, as well as the completion date, were accepted by the appellant without any challenges and/or objections and the appellant had still not been able to complete the project by the second completion date, time was set at large by the acts of the respondent and/or the consultant, by virtue of their acts in undertaking the said changes to the design and procedures to the project which prevented the appellant from completing the project by the first completion date and by the respondent's failure to revert to the appellant's letters requesting for instructions by the respondent. (para 30)

(4) The respondent was not entitled to the damages claimed as the appellant had not breached the terms of the contract and, due to the fact that the termination of the same was wrongful. There was no basis for a claim of refund of the monies paid, more so when work had been done by the appellants. The respondent's claim for expenses was not claimable as there was no alleged breach of the contract by the appellant. Such expenses were not occasioned due and/or attributed to the appellant or its conduct; nor was it a cause or as a result of any breaches of contract by the appellant and, as such, were not claimable. (para 36)

(5) It was clear from the contract that any variation in the contract was to be in writing by the contract administrator. However, there was no indication of evidence of the said alleged variations being in writing by

A the respondent or the contract administrator as per the contract. The respondent had deviated from the terms of the contract and what was clear from the facts was that there had been a variation as to the design and procedures with regards to the project, as well as the extended completion period up to the second completion date and this was
B accepted by both parties. (paras 40 & 41)

Case(s) referred to:
Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***
David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***
C *Fajar Menyensing Sdn Bhd v. Angsana Sdn Bhd [1998] 1 LNS 88 HC* ***(refd)***
Kerajaan Malaysia v. Ven-Coal Resources Sdn Bhd [2014] 5 CLJ 186 HC ***(refd)***
Professional Element Sdn Bhd v. YFG Engineering Sdn Bhd & Anor [2021] 1 LNS 1250 HC ***(refd)***
Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading [1971] 1 LNS 132 HC ***(refd)***
D *Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd [1993] 4 CLJ 12 SC* ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, s. 56(3)

Other source(s) referred to:
E *Keating on Construction Contracts*, 7th edn, 2001, p 289
Professor Vincent Powell Smith, *The Malaysian Standard Fork of Building Contract,* p 110

For the appellant/defendant - Richard Kok Chi Wei & Erin Lim Wen Xin; M/s Richard Kok
F *For the respondent/plaintiff - Mohd Daniel Taqiudin Roslan; M/s Scully Yoon*

Reported by Najib Tamby

JUDGMENT

Nadzarin Wok Nordin J:

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Preface

[1] In the appeal before me, the appellant has appealed against the decision of the Sessions Court given on 22 March 2022 ("judgment") after a full trial which allowed the respondent's claim and dismissed the
H appellant's counterclaim with costs.

[2] The sum ordered to be paid by the appellant to the respondent consisted of:

(i) a sum exceeding RM1,071,246.87 by allowing the following prayers in
I the respondent's statement of claim:

(a) RM8,000 in prayer (a), RM7,500 in prayer (b) and RM59,461.50 in prayer (c) of the statement of claim which are purportedly monies paid by respondent to third parties such as quantity surveyor, land surveyor, structural engineer, prior to the contract with the appellant;

(b) RM357,800 in prayer (d) which are all the monies paid by the respondent to appellant according to the contract as if there was a total failure of consideration despite the fact that material were purchased and the fabrication works are near completion;

(c) RM3,750 in prayer (e) of the statement of claim which are purportedly monies paid by the respondent to organise meetings and meals in hotels for the project which were not part of the contract;

(d) RM50,253.45 in prayer (f) of the statement of claim which are purportedly monies paid by the respondent to organise the "Programme for Certification of Glulam Fabricators" which the respondent did it on its own accord for the timber industry and imposed it on the appellant for the glulam bridge even though it was not part of the contract;

(e) RM243,189.01 in prayer (g) of the statement of claim which are purportedly monies paid by the respondent to organise the "Quality Assurance Programme" conducted by Dr Adam which the respondent did it on its own accord for the timber industry and imposed it on the appellant for the glulam bridge even though it was not part of the contract;

(f) RM203,800 in prayer (h) of the statement of claim, the court ordered liquidated damages to be paid from contractual completion date of 23 August 2016 until the date of decision on 22 March 2022 despite the respondent's admission that the time of completion had been extended until 17 July 2017 and they had terminated the contract *via* notice of termination dated 16 April 2018;

(g) RM25,000 in prayer (i) of the statement of claim for pre-judgment interests on sums paid before the contract on 5 March 2015 more than six years ago;

(h) RM112,492.91 for pre-judgment in prayer (j);

(i) post-judgment interests in prayer (k) of the statement of claim for interests on all sums awarded including prejudgment interests tantamount to interests on interests prohibited by s. 11 of the Civil Law Act 1956; and

(j) costs of RM40,000 in prayer (l).

[3] The facts of this case were briefly as follows:

(i) on 26 February 2014, the defendant/appellant had submitted and presented their proposal to the plaintiff/respondent to design and build a pedestrian bridge in Precinct 16, Putrajaya by using glued laminated timber or glulam ("the project/work");

(ii) the plaintiff/respondent had, by a letter dated 27 February 2014, given its provisional approval to the defendant/appellant and invited the defendant/appellant to present a revised proposal based on the comments and guidelines as stated in the plaintiff/respondent's said letter dated 27 February 2014;

(iii) pursuant to the board's approval of the project/work, the plaintiff/respondent had sent out a letter of appointment dated 20 October 2014 to Perunding DMA Sdn Bhd ("Perunding DMA") *via* email and subsequently the plaintiff/respondent had inadvertently sent out another letter of appointment dated 23 October 2014 with the same contents as stated in the letter of appointment dated 20 October 2014 by post to Perunding DMA in appointing Perunding DMA as a third party independent quantity surveyor, to carry out an independent check on the costs submitted by the defendant/appellant to which the plaintiff/respondent had allegedly incurred an amount of RM8,000 as professional fees for the services provided by Perunding DMA in respect of the project/work;

(iv) the plaintiff/respondent had also engaged the services of Survey Spectra Sdn Bhd ("Survey Spectra") on 20 October 2014 to conduct a site investigation. The plaintiff/respondent had allegedly incurred a sum of RM7,500 being the charges for the services provided by the aforesaid Survey Spectra;

(v) the plaintiff/respondent had engaged the professional services of Mr Rune Braanaas Abrahamsen ("Mr Rune"), who is a professional timber bridge engineer with the relevant expertise in the area of the project/work, as a professional consultant. The plaintiff/respondent had allegedly incurred a sum of RM59,461.50 being Mr Rune's professional consultation fees and expenses during the above event and his visit to Malaysia from 15 November 2014 to 22 November 2014;

(vi) the plaintiff/respondent had, upon receiving the evaluation report dated 30 October 2014 from Perunding DMA, resolved, approved and awarded the project/work to the defendant/appellant through a letter of award dated 16 December 2014 with the mutually agreed contract sum of RM1,789,000 ("the agreed contract sum");

(vii) the defendant/appellant had issued an invoice dated 24 December 2014 to the plaintiff/respondent requesting for the first payment towards the agreed contract sum to be paid to the defendant/appellant, of which the plaintiff/respondent had then issued a cheque bearing no. 002371 dated 9 February 2015 amounting to the sum of RM357,800 to the defendant/appellant being payment equivalent to 20% of the agreed contract sum as valuable consideration and part-payment towards the agreed contract sum;

(viii) by an agreement dated 5 March 2015 which was duly executed and entered into between the plaintiff/respondent and the defendant/appellant ("the agreement/contract") in Kuala Lumpur, the plaintiff/respondent had formally appointed and engaged the services of the defendant/appellant;

(ix) under the agreement/contract, the defendant/appellant is contractually obliged as the contractor to manufacture, design, build, install, complete and deliver the glulam pedestrian bridge at Precinct 16, Putrajaya to the plaintiff/respondent for the agreed lump sum contract price of RM1,789,000 on or before 23 August 2016 ("the first completion date");

(x) the plaintiff/respondent had proposed to conduct a program for Quality Mark for Glulam and on 15 May 2015 the plaintiff/respondent had requested for Dr Constantine Adam from Australia to conduct the Glulam Quality Mark Program in Malaysia in order to assist and facilitate the defendant/appellant in the project/work;

(xi) the plaintiff/respondent had also allegedly carried out Certification of Glulam Fabricators. The defendant/appellant and three other Malaysian Glulam Fabricators, namely Peka Consortium Sdn Bhd, Standard Wood Products Sdn Bhd and Forest Avenue International Sdn Bhd had participated in the Glulam Quality Mark Program which was used primarily to assist and facilitate the defendant/appellant in the project/work;

(xii) the plaintiff/respondent had thus allegedly incurred a total sum of RM201,013.78 in respect of the aforesaid programmes for the benefit of the defendant/appellant. However, it was contended that the defendant/appellant's failure, refusal and neglect in completing the project/work has rendered all the costs incurred by the plaintiff/respondent to be totally wasted and as such after dividing the said costs in the total sum of RM201,013.78 amongst the abovementioned four participating companies, the portion of costs attributed to the defendant/appellant is in the sum of RM50,253.45;

(xiii) on 8 June 2015, the plaintiff/respondent had organised a "kick-off meeting" with the defendant/appellant, the architect, quantity surveyor and officers from local councils to discuss matters in relation to the project/work at The Everly Hotel Putrajaya. The plaintiff/respondent had allegedly incurred costs of RM3,750 for organising the said meeting solely for the benefit of the defendant/appellant;

(xiv) the plaintiff/respondent had once again taken the initiative to have the first technical meeting on 10 March 2016 with the defendant/appellant, local councils and other relevant parties for the purposes of having a discussion in relation to the progress of the project/work. During the aforesaid meeting, the defendant/appellant had allegedly informed the plaintiff/respondent that the time schedule for the completion of the project/work would be as follows:

(a) site preparation: January 2016 to May 2016;

(b) manufacturing of beam and test: March 2016 to June 2016;

(c) installation and Finishing: July 2016 to August 2016; and

(d) handover to MTC and PJC: September 2016.

(xv) due to the constraints of the time frame to complete the project/work and the allegedly slow-moving, sluggish performance of the defendant/appellant, the plaintiff/respondent states that it was compelled to engage the professional services of Dr Constantine Adam, to assist and facilitate the project/work by supervising the defendant/appellant in the production and testing of the beams for the project/work. This was supposedly made known to the defendant/appellant on 13 April 2016, during the second technical meeting;

(xvi) it was thus argued that, the defendant/appellant had clearly failed, refused and/or neglected to complete the project/work on 23 August 2016 and that the defendant/appellant also had failed to adhere to the timeline as given and promised by the defendant/appellant during the first technical meeting on 10 March 2016 as mentioned hereinabove;

(xvii) the plaintiff/respondent had during the third technical meeting on 26 September 2016 allegedly requested the defendant/appellant to provide the plaintiff/respondent with the final revised timeline to complete the project/work and had also instructed the defendant/appellant to submit monthly progress reports to the plaintiff/respondent in respect of the work done for the project/work in accordance with the final revised timeline to ensure that the defendant/appellant is in fact actively carrying out the works towards the completion of the project/work;

(xviii) during the fourth technical meeting on 24 October 2016, the plaintiff/respondent had allegedly agreed to grant an extension of time to the defendant/appellant for the completion and delivery of the project/work, and hence the final completion date for the defendant/appellant to complete and deliver the project/work to the plaintiff/respondent and PJC was mutually agreed to be on 17 July 2017 ("the second completion date");

(xix) the plaintiff/respondent was subsequently informed based on a report dated 30 December 2016 prepared by Dr Constantine Adam that the defendant/appellant had clearly failed, refused and/or neglected to comply with the procedures and instructions set by Dr Constantine Adam and that the defendant/appellant had, it was contended, failed, refused and/or neglected to report the results of the test for 30 finger joints as instructed, to Dr Constantine Adam and the plaintiff/respondent for review, comments and final approval prior to the commencement of the lamination process, which had then resulted in the failure of the test for the two beams that were manufactured by the defendant/appellant;

(xx) it was submitted that Dr Constantine Adam had also, in the same report, further stated that he had no means to check or to further investigate the low finger joints value as the finger joints were tested after the laminating process had been carried out. As such, it was alleged that it was the fault of the defendant/appellant who had failed, refused and/or neglected to comply with the procedures and instructions of the professional consultant Dr Constantine Adam at all material times;

(xxi) as a result thereof, the sum of RM243,189.01 which was allegedly incurred by the plaintiff/respondent as the extra costs of appointing Dr Constantine Adam for the Quality Assurance Programme specifically for the glulam pedestrian bridge under the project/work for the absolute benefit of and to assist the defendant/appellant has been totally wasted and rendered completely worthless in light of the non-compliance of the defendant/appellant with the procedures and instructions as stipulated by the aforesaid consultant;

(xxii) on 17 July 2017, the plaintiff/respondent had allegedly requested for a report from the defendant/appellant in order to determine if the defendant/appellant had in fact completed the project/work. However, it was submitted that the defendant/appellant had on 25 August 2017 submitted the same report which had already been given earlier to the plaintiff/respondent in January 2017;

(xxiii) the latest progress report sent by the defendant/appellant on 25 August 2017 allegedly clearly showed that the defendant/appellant had not made any progress nor done any further work;

(xxiv) it was argued that by virtue of cl. 1.4 of the agreement/contract, the plaintiff/respondent and the defendant/appellant had clearly agreed that all instructions, decisions and notices between the parties in relation to the project/work must be in writing and that no oral or written instruction is valid unless confirmed in writing as well as that the parties had at all material times agreed that the final completion date for the project/work was on 17 July 2017;

(xxv) the defendant/appellant had allegedly clearly failed to design, manufacture, construct and/or install the project/work in Precinct 16, Putrajaya and had failed, refused and/or neglected to fulfil its contractual obligations to complete and deliver the project/work to the plaintiff/respondent and PJC as expressly agreed between the plaintiff/respondent and the defendant/appellant in the agreement/contract dated 5 March 2015 and subsequently in the collateral contract whereby the parties had agreed to a final completion date of 17 July 2017 during the fourth technical meeting on 24 October 2016;

(xxvi) the plaintiff/respondent had terminated the agreement/contract in accordance with cl. 6.1 of the agreement/contract in view of the fact that the contractor who is the defendant/appellant in this instant case, had allegedly defaulted by not proceeding with the project/work in a regular and timely manner, by stopping or suspending the project/work without valid grounds, and/or by not complying with the terms and conditions in the agreement/contract and/or in the collateral contract at all material times;

(a) the plaintiff/respondent had alleged that it had therefore suffered substantial losses and/or damages as a direct consequence of the defendant/appellant's alleged unlawful breach of contract and the plaintiff/respondent thus filed a civil suit in the Kuala Lumpur Sessions Court seeking judgment against the defendant/appellant, *inter alia*, for the sum of RM729,953.96, liquidated and ascertained damages at RM100 per day, general damages, interest of 5% per annum and costs;

(b) the learned Sessions Court Judge on 22 March 2022 granted judgment in favour of the plaintiff/respondent's claims in which the learned Sessions Court Judge awarded all of the plaintiff/respondent's prayers and ordered the defendant/appellant to pay cost to the plaintiff/respondent based on the costs scale under the Rules of Court 2012;

(c) hence, the appeal herein filed by the defendant/appellant against the whole decision of the learned Sessions Court Judge.

[4] The appellant had thus, argued in brief that: A

(i) the delay complained of was due to the respondent;

(ii) the respondent has abandoned the project; and

(iii) the termination was wrong.

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Findings

[5] On the issue of the appellant's contention that the delay complained of was due to the respondent which the learned Sessions Court Judge ("SCJ") had held that, the appellant had delayed and did not complete the project and thus the respondent had rightly terminated the contract, this court has had C to consider whether the appointment by the respondent of the consultant, Dr Constantine Adam ("Dr Adam") had caused the delay where it was argued by the appellant that the appointment of Dr Adam had rendered time under the contract to be at large.

[6] In the SCJ's grounds, the SCJ had found that on 15 May 2015, the D respondent had spent a sum of RM201,013.78 to organise a programme known as 'Quality Mark for Glulam', which was attended to by glulam fabricators and three other fabricators in Malaysia, whereby various activities and programmes were held to assist and facilitate the appellant in executing the project, and held that the appellant had failed, refused and/or E neglected to complete the project on or before 17 July 2017 and thus, the sum spent by the respondent was wasted with the sum spent by the respondent for each fabricator being RM50,253.45.

[7] I have found after reading the contract that, the contract was a lump F sum contract for RM1,789,000 with a time period of 18 months to complete the project *ie*, from 24 February 2015 to 23 August 2016 (first completion date) which amounts therein were to be paid upon completion of each stage of the project but there was no provision mentioned therein with regards the appointment of Dr Adam. From the evidence, Dr Adam was appointed *via* the respondent's letter dated 28 May 2015 addressed to the appellant. There G however, does not seem to be any evidence shown by the appellant that they had at any material time objected to Dr Adam's appointment which I then hold that Dr Adam's appointment was thus consented to by the appellant or at the very least not objected to and by which they can be said to have now waived their right to object to the said Dr Adam's appointment.

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[8] In the minutes of the fourth technical meeting held on 24 October 2016 (fourth technical meeting), which was after the completion date of the contract *ie*, 23 August 2016, whereby the appellants and respondents various representatives as well as Dr Adam was present, it was recorded that *inter alia* that Dr Adam explaining the quality control of the glulam beams and the I manufacturing process thereto and that 'The top and bottom beams will be

completed in March and April 2017 respectively . The beams will be ready to be transported to the site in April 2017'. According to the appellants this was the reason why the first completion date under the contract was extended.

[9] It is, however, clear from the minutes of the fourth technical meeting that the completion date of the contract was at the said fourth technical meeting extended to 17 July 2017 (second completion date) and that there was to be a relocation of the project apart from demolition and rectification works and the costs for the same which have yet to be discussed in detail. I have also noted that the minutes of the fourth technical meeting did not record any objection by the appellant with regards the second completion date. The appellant's contention that the completion date was rendered at large due to Dr Adam's appointment, and actions is thus unacceptable.

[10] The revised timeline *vis-à-vis* the second completion date was also confirmed by DW1 when under cross-examination he had testified:

Q Can you confirm that this is the Annex 2, Project Timeline referred to at page 377 paragraph 4.1 Bundle C which presented to the everyone that was present during the fourth technical meeting?

A Yes.

Q The title there is Putrajaya Glulam Footbridge Program 11 October 2016, right?

A Hmm.

Q And the subheading as you can read, Glulam Footbridge Works, A) Prelim Works, B) Glulam Test & Productions (Factory), C) Foundation Works, D) Installation works, E) Electrical Lightings, F) CCTV System, G) Panic Button System, H) Public Wifi System, I) Scaffolding Works, J) Landscape Works and finally and the end there Handling Over. And you see on the right hand side where the diagram is Handling Over 10th July. Can you see that Mr. Asmadi?

A Yes.

Q That is one week before final extended completion date of 17th July. Right? Confirm?

A Yes.

Q This is the project timelime that was presented by you during the 4th technical meeting.

A Yes.

Q And this was prepared by MyGlam Sdn Bhd as clearly stated seen down there, the wordings bottom.

A Yes.

Q Mr. Asmadi, can I bring you now back to paragraph 4.2 at page 377 of Bundle C?

A Yes.

Q I read it out to you, the meeting agreed that the commencement and completion dates to be put on the signage will be from 17 January 2017 until 17 July 2017. The duration is only for on-site works and excludes the manufacturing process. The action is by MyGlam to be taken on the right. Correct?

A Correct.

Q Based on this would you agree with me that the signages itself to be put by MyGlam at stated clearly the completion to be 17 July 2017 and on-site works excludes the manufacturing process to be done from 17.1.2017 to 17.7.2017. agree or disagree?

A Agree.

[11] From the evidence at trial, DW1 had under cross-examination also not only agreed to the second completion date but that the appellant would be able to be completed by the second completion date where he testified as follows:

Q Mr. Ting, can you now please turn to page 377 at paragraph 4.0 subheading of Presentation of Project Timeline and Progress Report by MyGlam Sdn Bhd?

A Yes.

Q Based on this paragraph, specifically referring to 4.1 whereby the Defendant's CEO Mr. Asmadi presented the progress report in Annex 1 and project timeline in Annex 2. You were present. Can you confirm this?

A Yes.

Q Furthermore, Mr. Asmadi explained the progress of the project is determined by the manufacturing timeline. On-site construction will start in January 2017 and the bridge will be handed over to PJC in July 2017. Can you confirm this as what it has been stated to all the stakeholders of the bridge project here?

A Yes.

Q And further on in the same para 4.1, the short construction time recorded for this project will help to promote the used of glulam. Based on this, would you agree with me that the Defendant had actually presented to the fourth technical meeting all the stakeholders present that there was only a short construction time that will be need for this project to be completed in order to promote the use of glulam. Agree or disagree?

A Agree.

Q In the subsequent paragraph 4.2 below, agreed that the commencement and completion dates to be put on the signage will be from 17.1.2017 to 17.7.2017. Would you agree or disagree for that?

A Agree.

Q The duration here is stipulated to be only for on-site work exclude specifically the manufacturing process. You agree or disagree?

A Agree.

B Q Would you now kindly turn to the next page 378 at the same bundle? Paragraph 4.3, Ar. Asmadi explained that on-site work will start in January 2017 so that a minimum time frame will be achieved for this project. This will also reduce the time gap between on-site work and installation of glulam beams. Mr. Ting, based on this, the CEO of the Defendant has specifically informed all stakeholders C present during this fourth technical meeting that minimum time frame will be achieve for this project and it also will reduce the time gap between on-site work installation of the glulam beams. Agree or disagree?

A Agree.

D Q Can you kindly scroll down to the next paragraph, still in same page? Puan Hakim, I am referring the witness now to paragraph 5.0. Can you see the heading of Manufacturing Control?

A Yes.

E Q Mr. Ting, I read it out to you. Dr. Con Adam, explained that the quality control progamme is carried out to ensure that the glulam beams have the quality and properties as designed. He briefed the meeting on the glulam beams manufacturing process and quality control progamme. Mr. Ting, based on this when you were present in this fourth technical meeting. Do you agree that Dr. Con Adam F is in fact specifically supervising the issue of quality control in respect of the glulam beams manufacturing process to ensure quality on the glulam bridge project. Agree or disagree?

A Agree.

Q Mr. Ting, do you agree with me that at this material point of time G neither you nor Mr. Asmadi Mohamad is that COO and CEO respectively of the Defendant company had raised any objection to Dr. Con Adam participation as a consultant in the Glulam Bridge Project. Agree or disagree?

A Agree.

H Q Mr. Ting, would you agree with me that all material time, Dr. Con Adam was known to the Defendant and all other stakeholders of the Glulam Bridge Project to be the consultant, assisting and facilitating the Glulam bridge project work. Agree or disagree?

A Agree.

I **[12]** Thus, it is this court's opinion that that the appellant had not only accepted the second completion date but also the variations proposed by the respondent and/or Dr Adam, as the case maybe.

[13] It was also argued by the appellant that Dr Adam had imposed additional Australian standards *ie*, the Glued Laminated Timber Association of Australia systems which were not found in the contract and that time was prolonged when Dr Adam's had applied different standards, the imposition of which was not expected by the appellant. I agree with learned appellant's counsel that from the evidence, Dr Adam had imposed the additional Australian standards which were not part of the contract as can be seen in the following, amongst others, evidence tendered at trial:

(i) the document entitled 'MTC GLULAM MARK PROJECT'; and

(ii) an email dated 27 January 2016 from the respondent sent to the appellant entitled '*A Step by Step Guide To Manufacturing of the Glulam Pedestrian Bridge on Behalf of MTC*'.

[14] The plaintiff's witness, Lau Li Har, SP3, had also testified that Dr Adam had imposed both the Australian and New Zealand standards as seen in the notes of evidence as follows:

SP3 agreed that Dr Adam imposed the Australian and New Zealand Standards and not the Malaysian Standards as per the Contract.

SP3 at page 93 (line 33 to 44) of Enclosure 5

PD Now, same page 522 I'm referring you to the heading called Face Joint Bond Quality Results. And I'm reading from the second line, Dr Adam said this specimen were subjected to bad conditioning and tested in accordance with AS/NZS this is the different number AS/NZS1328.1.

Do you agree this is An Australian and New Zealand standard?

SP3 Yes.

PD These 2 standards were not in the contract between the Respondent and the Appellant, agree?

SP3 Yes. S/N pLZYWVGXREipVPCf7D6noQ**Note: Serial number will be used to verify the originality of this document *via* eFILING portal

SP3 at page 97 (line 1 to 41) of Enclosure 5

PD Can I refer you to your witness statement page 4 question 13 and at the same time refer to Bundle B page 157 is part of the contract between Respondent and Appellant, agree?

SP3 Yes.

PD At page 157 clause 3.3.1 (c) it is stated that this standard for timber grading is MS 1714:2003 agree?

SP3 Yes.

PD This is the standard that the Appellant must fulfil, agree?

SP3 Yes.

PD Now, according to this email that you sent the grading specified by Dr Adam is in accordance to AS2082, agree?

SP3 Yes.

PD AS2082 is an Australian standard for grading, agree?

SP3 Yes

[15] In deciding whether the SCJ was right in her decision that the appellant had breached the contract and did not complete the project by the second completion date, this court had found that there were five technical meetings held between the parties with regards the project being 10 March 2016, 13 April 2016, 26 September 2016, 24 October 2016 and 2 December 2016. In this regard, I had also perused the Progress Report No. 03 prepared by the appellant and the Progress Report No. 04 from 17 January 2017 to 25 August 2017 which showed no progress or development of the project. This was also confirmed by DW1, Ahmad Asmadi bin Mohammad, under cross-examination as can be seen by the notes of evidence where DW1 testified:

[Please refer to page 423 of the ROA Vol 2(B), Part B]

Q Can you please confirm also that the contents of both the reports dated 19.1.2017 and 25.8.2017 are essentially the same?

A Exactly, yes, is the same.

Q Mr. Asmadi, would you agree with me that the content of both reports are the same because the Defendant had not done anything at all between 23.8.2016 to 17.7.2017?

A I disagree.

Q Mr. Asmadi, would you agree with me that the Defendant have failed to submit monthly progress reports from January until August 2017 as required by the Plaintiff?

A There was no progress at site. So we do not submit that.

[16] This court has also seen from the evidence produced at trial that a sum of RM357,800 only has been paid by the appellant to the respondent as shown by the respondent's purchase requisition form dated 26 January 2014 for the said sum and the CIMB Bank cheque dated 9 February 2015 issued by the respondent to the appellant, which is only 20% of the contract sum. This can also be seen in the notes of evidence where DW2, Ting Ken Hian, when cross-examined on this had testified as follows:

[Please refer to pages 485 to 486 of the ROA Vol 2(B), Part B]

Q Mr. Ting, can you confirm that only the first item 1, upon signing of contract and completion of drawings 20% of the total agreed contract sum RM1,789,000.00 is the amount paid in the sum of RM357,800.00 paid by the Plaintiff to the Defendant as part payment for the Glulam Bridge Project?

A Yes

Q Mr. Ting, can you confirm the fact that thereafter there were no request for payment from the Defendant to the Plaintiff as there were no progress made beyond item 1 in respect the Glulam Bridge Project?

A Yes

Q Mr. Ting, would you agree with me that at the end of the day only upon completion and delivery of the Glulam Timber Bridge Project? You would reach the end of the payment schedule which then 8 items there it total sum up to RM1,789,000.00?

A Yes

Q Would you agree that no further payment was made by the Plaintiff to the Defendant because the Defendant had ultimately failed to complete and deliver the Glulam Timber Bridge Project to the Plaintiff as per the contract. Agree or disagree?

A I won't say that we failed.

Q Mr Ting, basically would you agree that no works beyond item 1 were done? That's why no payment were made by the Plaintiff to the Defendant as per the payment schedule. Agree or disagree?

A Yes.

[17] The SCJ had also stated in her grounds that, Dr Adam in his report dated 30 December 2016 (30 January 2016 report), the respondent was informed that the appellant had failed, refused and/or neglected to comply with the directions by Dr Adam to the respondent, which the SCJ concluded were due to the respondent failure, refusal and/or neglect at all material times to follow the procedures and directions of Dr Adam. I have since examined this 30 January 2016 report which was conducted during Dr Adam's visit for the period 15 to 22 December 2016 where Dr Adam outlined *inter alia* that:

(i) the appellant had failed to comply with the 30-finger jointed laminated procedure;

(ii) the testing of finger joints taken from beams one and two were not tested prior lamination commenced and was thus rendered useless;

A (iii) the finger joint bending strength for the west end did not meet the minimum requirements and the design value and had failed to achieve the target of 53.2MPq as well as the design strength; and

(iv) the low results were predominantly due to timber failure rather than joint failure.

B

[18] I have considered the appellant's defence and submissions that by applying different standards, time was prolonged. I accept this argument as the evidence shows that Dr Adam had to be physically present to monitor the standards imposed which were not originally stated in the contract and that the appellant had to fulfil additional requirements and tests which would C have affected the time imposed under the contract.

[19] The evidence before at the Sessions Court also shows that Dr Adam's schedule and availability had an impact on the project as Dr Adam had only visited Malaysia on five occasions beginning in September 2015 and the last D visit being in December 2016 and that the appellant's work could not progress without Dr Adam's supervision.

[20] I have, thereafter, viewed the alleged request for instructions by the appellant on 31 July 2017, 25 August 2017, 17 October 2017, 17 November 2017, 26 January 2018 and 29 March 2018 which were unanswered by the E respondent. A reading of these letters show that the appellant was *inter alia* seeking further instructions whether to recommence works and the revised costs thereto.

[21] In *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155, the Court of Appeal held:

F

> There are cases – business and mercantile cases – in which the Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree

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> …
>
> During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt H and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.

[22] The respondent's silence to reply to the appellant's letters requesting for instructions by the respondent on 31 July 2017, 25 August 2017, 17 October 2017, 17 November 2017, 26 January 2018 and 29 March 2018 I on this matter is rather perplexing and comes only after a year after the appellants letter of 31 July 2017 and that too, by way of a termination notice

dated 16 April 2018. The respondent could easily have responded to the appellants letters but chose not to do so and remained silent. This in my considered view is evidence that the respondent had in fact abandoned the project after 24 January 2017. A

[23] It is material to note that the evidence at trial then shows that the letter to terminate the contract from the respondent's solicitors, Messrs NS Leong & ST Low to the appellant was dated 16 April 2018 and referred to the termination date of 23 August 2016 as per the contract by expressly stating in writing therein that the respondent was terminating the project as it was to have 'been completed by 23 August 2016 but to date you have failed, refused and omitted to do so. In this regard, you have clearly breached the contract and our client takes the position that the contract is terminated'. B C

[24] For the contract to be terminated, cl. 6.1.2 of the said contract provides that a default notice is required to be issued beforehand by the contract administrator to rectify the default within a specific period or if no period is mentioned therein within 14 days from the date the appellants receives the said notice with the right to the respondent to terminate the contract due to the failure to rectify the same. D

[25] As the respondent had insisted on relying on the first completion date as per the contract, it would then be incumbent upon the respondent to comply with the said cl. 6.1.2 of the said contract with regard the termination procedure and also comply with cl. 1.5 with regard any variation to the works under the contract of which the respondent had failed to do. E

[26] After considering the said 30 January 2016 report and all of the above evidence herein above mentioned, I cannot agree with the finding of the SCJ that that the appellant had breached the contract and did not complete the project by the second completion date and I do hold that the SCJ had failed to appreciate or consider that the location and change of specifications and that the appellant was told to cease fabrication works at the value management workshop on 24 January 2017. F G

[27] After making her above said findings, the SCJ then held that the respondent had rightfully terminated the contract in accordance with cl. 6.1. Here again, this court finds that the SCJ was incorrect in coming to her findings thereto based on the aforesaid reasons above and s. 56(3) of the Contracts Act 1950 which reads: H

> (3) Effect of acceptance of performance at time other than that agreed upon.
>
> If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so. I

[28] Hence by virtue of my decision, I hold that the respondent's acts disentitle them from relying on the first completion date and that the termination was not in accordance with the contract, see *Fajar Menyensing Sdn Bhd v. Angsana Sdn Bhd* [1998] 1 LNS 88; [1998] 6 MLJ 80. As such, the termination thereto was wrongful due to the failure of the respondent to strictly comply with cl. 6 of the contract, which according to Professor Vincent Powell Smith in his book *The Malaysian Standard Fork of Building Contract* at p. 110:

> Because of the seriousness of the consequences of action under cl. 25(1), it is suggested that the strict letter of the clause should be followed. A wrongful or otherwise invalid determination of the contractor's employment would amount to a repudiatory breach of contract by the employer. In particular, the times laid down and the contents of the notices should be strictly observed, and so should the requirement as to service by registered post or recorded delivery …

[29] It is trite that an appellate court should not interfere in the finding of facts by the court below save where the instances referred to by the Court of Appeal in *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773; [2014] 4 MLJ 619 where Abdul Malik Ishak JCA (as His Lordship then was) in delivering the judgment of the said appellate court held:

> [52] An appellate court will interfere where the trial court had misdirected itself and applied the wrong principles of law. The appellate court will not hesitate to interfere with findings made by the court of first instance where there was insufficient judicial appreciation of the evidence or where the findings do not accord with the probabilities of the case.
>
> [53] In *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 MLJ 85 (CA) at pp 106-107, I set out instances when appellate interference is warranted:
>
> [64] Finally, I will now say something about the finding of facts by the High Court which has been alluded to by my learned brother Low Hop Bing JCA. An appellate court will not readily interfere with the finding of facts arrived at by the trial court. It is trite law that the primary task of evaluation of the evidence and the function of determining where the truth lies, on a balance of probabilities, is entrusted by law to the trial court. In this appeal it is to the High Court. And the appellate court is under a duty to intervene with the finding of facts by the trial court where the trial court has so fundamentally misdirected itself that a reasonable man may safely say that no reasonable court which had properly directed itself and asked the right questions would have arrived at the same conclusion (*Renal Link (KL) Sdn Bhd v. Dato' Dr Harnam Singh* [1997] 2 MLJ 373 at p. 379; [1997] 3 AMR 2430 (CA) at p. 2440D-E; *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v. Metaico Industries (M) Sdn Bhd* [1995] 2 MLJ 153; [1995] 2 AMR 1353 (CA) at pp. 171H-173A; *Associated Tractors Sdn Bhd v. Woo Sai Wa* [1997] 5 MLJ 441 at p. 450F-H; and *Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 3 AMR 410; [2006] 2 CLJ 337 (CA) at p. 417, at para. 18).

[30] Based on all of the above, and although I have found that Dr Adam's appointment and his proposals with regards the project as well as the second completion date were accepted by the appellant without any challenge and/or objections and that the appellant had still not been able to complete the project by the second completion date, I hold that time is set at large by the acts of the respondent and/or Dr Adam who is their consultant, by virtue of their acts in undertaking the said changes to the design and procedures to the project which had prevented the appellant from completing the projects by the first completion date and by the respondent's failure to revert to the appellant's letters requesting for instructions by the respondent on 31 July 2017, 25 August 2017, 17 October 2017, 17 November 2017, 26 January 2018 and 29 March 2018.

[31] On the issue of time being at large, I rely on *Keating on Construction Contracts* (7th edn, 2001) where the authors state at p. 289 as follows:

> If the employer prevents the completion of the works in any way, as, for example, by failing to give possession of the site or to provide plans at the proper time, or by interfering improperly through its agent in the carrying out of the works, or by ordering extras which necessarily delay the works ... the general rule is that he loses the right to claim liquidated damages for non-completion to time, for he "cannot insist on a condition if it is his own fault that the condition has not been fulfilled" ...

[32] I also refer to *Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd* [1993] 4 CLJ 12; [1993] 3 MLJ 25 where the Supreme Court held:

> In dealing with this question we can do no better than be guided by the statement of the law in *Hudson's Building and Engineering Contracts*, 10th Ed, at p. 624, which is as follows:
>
> It has been seen that, for the purpose of treating the contract as repudiated, in the rare cases where time is of the essence, the contract time for completion may cease to be applicable for a variety of reasons, including the ordering of extras or other interference or prevention by the employer. In the case of damages, it is equally obvious that where the reason is some act of the employer or his architect or engineer preventing completion by the due date, it cannot be the intention of the parties that liquidated or other damages should be calculated from that date even if the act, such as ordering extras, is not a breach of contract. Liquidated damages stipulated for at a rate for each day or week of delay in completing the works must begin to run from some definite date. It follows, therefore, that if the date in the contract has for some such reason ceased to be the proper date for the completion of the works, and no contractual provision exists for the substitution of a new date, there is in such a case no date from which liquidated damages can run and the right to liquidated damages will have gone. This, rather than solicitude for the contractor, is the reason for the provision usually known as the extension of time clause. [1993] 3 MLJ 25 at 3.3

A The learned author gives a list of cases in which the court refused damages and another list in which it allowed them …

Amongst the conclusions reached by the learned author after considering these cases is that in cases where an agreement contains no clause for extension of time for completion, the acts of prevention by the employer whether authorized by the contract or whether in breach of it or whether the prevention is a cause of part or of the whole of the delay invalidate the liquidated damages clause because by such acts, in the words of Parke B in *Holme v. Guppy* (1838) 3 M&W 387; 150 ER 1195, and Lord Denning MR in *Trollope and Colls* [1973] 2 All ER 260, 'the time becomes at large'. Consequently there is no date from which damages could run and therefore no damages could be claimed.

In the present case, not only did the agreement contain no extension clause it also contained no clause authorizing extra work. This extra work must at least have caused part of the delay though it might not have caused the whole delay.

D On the question of delay in delivery of site, the court observed at p. 155 that it was also the appellant's case that the delay was caused by the respondent having delivered the site rather late, thus leaving little time for the appellant to complete the work. The court considered and applied the principle in *Dodd v. Churton* 3, and stated at p 156:

E At the risk of repetition we restate the principle in that where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for the default.

On the same page, the court reiterated that:

Only in circumstances in which the employer or his agent is in no way F to blame for the delay would the court be willing to allow damages. If the employer contributes to the delay by ordering extra work or is guilty of the delay in delivering possession of the site, or of any other cause no damages could be claimed. (See *Hudson* at pp. 624-628.)

[33] In *Kerajaan Malaysia v. Ven-Coal Resources Sdn Bhd* [2014] 5 CLJ 186, G Justice Lee Swee Seng (as His Lordship then was) held:

[28] When the SO improperly refused to grant an EOT in a situation that would warrant an EOT, then time for completion is set at large. As was held in the Singapore Court of Appeal case of *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86:

H [69] … the concept of time being set at large is not at all alien to construction disputes. It is firmly established that, as mentioned above, **time may be set at large** due to acts of prevention where there is no contractual provision governing the situation or **where the architect fails to properly grant an extension of time under the contract.** See also, I N Duncan Wallace QC, *Hudson's Building and Engineering Contracts* (Sweet and I Maxwell, 11th edn., 1995) vol. 2 at para. 10.040; Keith Pickavance, *Delay and Disruption in Construction Contracts* (Lloyd's of London Publishing Ltd, 3rd edn., 2005) at ch. 6 … (emphasis added)

[34] Thus, where there are acts of prevention which prevent the contract from being performed, the original completion date is cancelled or suspended and time will be set at large. Following from this, the employer should not be entitled to claim for liquidated damages under the said contract, because by its acts, the time for completion becomes at large and there was no date from which the damages could be assessed and the appellant must be given a reasonable time to complete the project as per the decision in *Sharikat Eastern Plastics Industry v. Sharikat Lam Seng Trading* [1971] 1 LNS 132; [1972] 1 MLJ 21 where it was stated:

> The stipulated time having been waived, the time became at large and that thereupon the defendants' only obligation was to deliver within a reasonable time. In my opinion, what is a reasonable time is a question of fact to be decided on the circumstances of each case.

[35] This court therefore holds that the respondent is not entitled to the damages claimed as the appellant had not breached the terms of the contract, and due to the fact that the termination of the same was wrongful. Thus, there is no basis for a claim of refund of the monies paid, more so when work had been done by the appellants.

[36] As to the respondent's claim for the purported expenses, this court finds that the same is not claimable as there is no alleged breach of the contract by the appellant on the grounds aforementioned. I hold that such expenses were not occasioned due and/or attributed to the appellant or its conduct nor was it a cause or as a result of any breaches of contract by the appellant and as such are not claimable from the appellant. Such risks are to be undertaken by the employer *ie*, the respondent herein as this was a project which was undertaken, owned and proposed by the respondent with the appellant being only appointed to construct the same and which the appellant was, in this case, prevented from completing due to the various acts of prevention by the respondent and/or its agent as mentioned. It is in the circumstances, not the law that the contractor/appellant is to reimburse or bear the burden of such costs and expenses incurred by the respondent, see *Professional Element Sdn Bhd v. YFG Engineering Sdn Bhd & Anor* [2021] 1 LNS 1250; [2021] MLJU 1355.

[37] I also agree that such unexpected rise in costs as a result of the variations in design and procedure, the change of location of the project *etc* should not be dumped by the respondent onto the appellant.

[38] Accordingly, the appellants appeal is allowed with costs and the judgment in favour of the respondent is hereby overturned.

A *Counterclaim*

[39] I now turn to the appellant's counterclaim where the appellant had pleaded that one of the issues was the frequent number of changes to the design which involved an increase in costs. The SCJ held that this claim/defence was untenable as it was the appellant's responsibility under
B the contract to exercise due diligence in ensuring that the project was completed in accordance with the contract and that there was no evidence tendered at trial to show that that the contract administrator had given any instructions in writing which was a requirement under the contract.

C **[40]** It is clear from the contract that any variations in the contract was to be in writing by the contract administrator, but this court has not been shown any indications or evidence of the said alleged variations being in writing by the respondent or the contract administrator as per the contract.

[41] It is thus apparent from the facts that, the respondent had deviated
D from the terms of the contract and what is clear from the facts is that there has been a variation as to the design and procedures with regards the project as well as the extended completion period up to the second completion date and this was accepted by both parties with no complaints and/or objections by the appellant. However, based on amongst others the variations in design
E and procedure, the change of location of the project which amounted to acts of prevention which prevent the contract from being performed by the appellant, time will be set at large.

[42] The appellant had also submitted that the SCJ was wrong in law to have refused to admit 34 pages of the appellants documents in support of its
F damages when the maker of these documents was called. In this respect, I agree with the SCJ that the appellant had not specifically pleaded for nor provided any particulars of the losses and damages claimed in its counterclaim and as such the 34 pages of the appellants documents in support of its damages was rightly not admitted at the trial by the SCJ.

G **[43]** In the circumstances, I am allowing the counterclaim as per prayers (a), (b) and (c) thereto and for the damages for wrongful termination to be assessed by the Sessions Court and the matter is hereby reverted to the said Sessions Court for the same.

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